

BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF ULP#14-77  
MONTANA FEDERATION OF TEACHERS on  
behalf of EASTERN MONTANA COLLEGE  
FACULTY BARGAINING COALITION,

Complainant,

FINAL ORDER

-vs-

ROBERT N. NOYES and his agents who  
comprise the Petitioners seeking  
Decertification in Case DCFB-77.

\*\*\*\*\*

A Proposed Findings of Fact, Conclusions of Law and  
Recommended Order was issued by Hearing Examiner, Mr. Jerry L.  
Painter, in the above captioned matter on July 29, 1977,  
dismissing the unfair labor practice complaint.

Exceptions to the Proposed Order were filed by Complainant  
on August 24, 1977 and oral argument was heard before the Board  
of Personnel Appeals on October 21, 1977.

After reviewing the record and considering the briefs and  
oral arguments, the Board makes the following Order:

IT IS ORDERED, that the Exceptions to the Hearing Examiner's  
Proposed Findings of Fact, Conclusions of Law and Proposed Order  
are denied.

IT IS ORDERED, that this Board therefore adopts the Findings  
of Fact, Conclusions of Law and Recommended Order issued by the  
Hearings Examiner.

Dated this 1<sup>st</sup> day of November, 1977.

BOARD OF PERSONNEL APPEALS

By

*Brent Cronley*  
Brent Cronley  
Chairman

1                   BEFORE THE BOARD OF PERSONNEL APPEALS

2 MONTANA FEDERATION OF TEACHERS on    }  
3 behalf of EASTERN MONTANA COLLEGE    }  
4 FACULTY BARGAINING COALITION,        }

5                   Complainant,        }

6                   -vs-                 }

7 ROBERT N. NOYES and his agents who   }  
8 comprise the Petitioners seeking    }  
9 Decertification in case DC #8,        }

10                  Respondents.        }

FINDINGS OF FACT,  
CONCLUSIONS OF LAW,  
AND RECOMMENDED ORDER  
ULF #14, 1977

11 \* \* \* \* \*

12       The Eastern Montana College Bargaining Coalition filed  
13 unfair labor practice charges against the above-named Respondents  
14 with the Board of Personnel Appeals on May 24, 1977. The  
15 complaint alleged that Respondents represented to employees  
16 contacted that by signing decertification cards they would be  
17 expressing a vote of confidence in the Coalition, and that such  
18 fraudulent representations induced certain employees to sign the  
19 cards when they otherwise would not have done so. The charge  
20 was signed by Joseph W. Duffy, counsel for the Montana Federation  
21 of Teachers, a member of the bargaining coalition.

22       Hearing on the matter was conducted on June 17, 1977, in  
23 the Petro West Room of the Eastern Montana College Student Union  
24 Building. Duly appointed Hearing Examiner for the Board was  
25 Jerry L. Painter. Mr. Duffy represented Complainant, and Dr.  
26 Noyes represented Respondents. Mr. Duffy moved that the petition  
27 filed with the Board be amended so that the Complainant be the  
28 "Montana Federation of Teachers on behalf of the Eastern Montana  
29 College Faculty Bargaining Coalition." The motion was granted  
30 and the Hearing Examiner declared that the American Association  
31 of University Professors, a member of the Coalition, is not a  
32 participant in the complaint.

33       The following Findings of Fact, Conclusions of Law, and  
34 Recommended Order are based upon a thorough review of the entire

1 record in this matter, including sworn testimony, exhibits as  
2 evidence, and written briefs.

### 3 FINDINGS OF FACT

4 1. Robert N. Noyes, a respondent in this matter, circulated  
5 a petition (Complainant's Exhibit 1.) among the members of the  
6 Eastern Montana College Faculty Bargaining Coalition seeking the  
7 signatures of those who "request that the Faculty Senate call for  
8 a vote on decertification when presented with the petition.  
9 Forty-nine members, including Dr. Noyes, signed the petition,  
10 which is dated November 9, 1977. Dr. Noyes was motivated to  
11 circulate the petition after observing several complaints among  
12 the members against the coalition.

13 2. The rules of this Board require that a petition for  
14 decertification be filed not more than 90 nor less than 60 days  
15 before the expiration of the current collective bargaining agree-  
16 ment. Since the Coalition's contract with the College expired  
17 June 30, 1977, the rule required the petition for decertification  
18 to be filed between May 2 and April 2. A few days before April 2,  
19 Dr. Noyes met with some of his colleagues to discuss approaching  
20 faculty members about signing authorization cards to decertify the  
21 coalition.

22 3. Those circulating the cards knew the legal effect of  
23 enough people signing the cards would be to call for a represent-  
24 ation election, rather than to be a vote of confidence in the  
25 Coalition. Dr. Noyes testified that those circulating the cards

26 wanted to have a positive attitude. We wanted to ask  
27 people to sign these. I said, "Please, don't use any  
28 pressure." Other people said, "Yes, why don't you  
29 suggest that this will call for a new election." I  
30 think we all agreed that if we didn't get the number  
31 of cards, we were going to junk the whole thing and  
32 join one of the two outfits and try to make the  
coalition work. I said, or someone said, "Tell these  
people that with a new election, if 'no' wins, well,  
that's 'no.' If AAUP, MEA (Montana Education Association),  
AFT (American Federation of Teachers) should win, we  
should all join them and support them." We tried to  
have a very wholesome, positive approach. We wanted

1 to get out of this bickering and, the business, the  
2 two outfits that weren't working together, represent-  
ing us. That was the gist of it.

3 4. George Madden, Associate Professor of Education, member  
4 of the Coalition Council, and chief spokesperson for the bargain-  
5 ing team that negotiated the contract that expired June 30, was  
6 approached by Dr. Noyes to see whether he wanted to sign the  
7 petition sent to the Faculty Senate in November. There is a  
8 conflict in testimony as to what exactly transpired during their  
9 conversation. Dr. Noyes testified that he did not tell Dr.  
10 Madden that the purpose of the petition was to get a vote of con-  
11 fidence in the coalition. He said he told Dr. Madden that it  
12 could be considered as a vote of confidence in the sense that if  
13 there were not enough signatures obtained to make the petition  
14 effective, he would throw it away. He testified that he did not  
15 tell Dr. Madden that signing the petition would be a vote of con-  
16 fidence in the Coalition.

17 Dr. Madden said in a sworn affidavit (Complainant's Exhibit  
18 2) that Dr. Noyes told him that the purpose of the November  
19 petition "was to secure a vote of confidence in the Coalition."  
20 He testified to the same effect at the hearing. Dr. Madden,  
21 who did not sign the petition, testified that he told Dr. Noyes  
22 at the time that he didn't see the petition to have that effect,  
23 but he said he believed the disagreement resulted from his having  
24 had more opportunity than Dr. Noyes to study and know about the  
25 law of collective bargaining in Montana. Dr. Madden did not  
26 deny Dr. Noyes's statement that Dr. Noyes did not say that signing  
27 the petition would be a vote of confidence in the Coalition.

28 5. Dr. Noyes and Dr. Madden had a conversation in April  
29 concerning the circulation of the authorization cards, and neither  
30 mentioned the question of the petition or the cards being a "vote  
31 of confidence."

32 6. Dr. Madden witnessed a faculty member approach one of

1 his colleagues about signing an authorization card. He test-  
2 ified that the would-be signer was told it was an "opportunity  
3 to have a vote of confidence" in the Coalition, and he said in  
4 a sworn affidavit (Complainant's Exhibit 2) that the person  
5 soliciting the signature said "the purpose was a vote of con-  
6 fidence" in the Coalition.

7 7. Dr. Madden knows of no faculty member signing an author-  
8 ization card believing it to be a vote of confidence in the  
9 Coalition. He testified that he was "pretty confident" that a  
10 number of faculty members signed cards believing them to be  
11 "involved with some kind of vote of confidence and did sign  
12 cards for that reason," but admitted that his belief comes from  
13 second-hand information. He said at the hearing, "I have heard  
14 people tell me that they have known people who said they signed  
15 it [the card] thinking it was a vote of confidence."

16 8. B.L. Mausman, Associate Professor of Psychology, was  
17 approached by a colleague and asked if he wanted to sign the  
18 November petition as it was being circulated. He was told the  
19 petition would be a chance to clear the air and have a vote of  
20 confidence in the Coalition.

21 9. James Ziegler, Associate Professor of History and  
22 President of the College's chapter of APT, said in a sworn  
23 affidavit (Complainant's Exhibit 4) that a faculty member told  
24 him that the "drive for signatures for a decertification election"  
25 had been represented to him as a vote of confidence. Dr.  
26 Ziegler testified that he told the person that he saw the cards  
27 as a vote for decertification of the Coalition rather than as  
28 a vote of confidence, unless one considers that by winning  
29 the election, the Coalition would have the confidence of the  
30 faculty. Dr. Ziegler told him that not signing the card would  
31 be a vote of confidence in the Coalition.

32 10. William Plank, Associate Professor of French and

1 grievance officer for the College's chapter of AFT, was visiting  
2 one day in April with Joann Meide, reference librarian, and a  
3 faculty member who was circulating authorization cards. He told  
4 the man that he thought circulating the cards would damage the  
5 credibility of the Coalition at the bargaining table. Dr. Plank  
6 said in a sworn affidavit (Complainant's Exhibit 3) that the  
7 person "answered me that he did not consider it damaging to the  
8 bargaining talks and that he was doing it because it was a vote  
9 of confidence for the bargaining agent." Dr. Plank testified that  
10 when he asked how that could be, the man told him that if the  
11 Coalition produces well and proves itself at the bargaining table,  
12 it will win the election and be stronger than ever.

13 11. Dr. Plank and Ms. Meide were approached later by  
14 another faculty member circulating authorization cards. Dr. Plank  
15 asked him why he was signing a card, since he thought that would  
16 jeopardize the Coalition's credibility at the bargaining table.  
17 The faculty member told him four or five times in the ensuing con-  
18 versation that there was no danger in that, that the card was  
19 merely a vote of confidence. The person did not tell Dr. Plank  
20 that he had been told the card was a vote of confidence.

21 12. Ms. Meide was asked by a colleague who had received an  
22 authorization card if signing it actually would be a vote of con-  
23 fidence. She told the person it would not. Ms. Meide had no  
24 knowledge of anyone signing an authorization card believing it to  
25 be a vote of confidence. She was told by some persons who signed  
26 the November petition they intended their signatures to be con-  
27 strued as a vote of confidence. She did not know as of the  
28 hearing how many there were.

29 Discussion: It must now be determined whether the use of  
30 the term "vote of confidence" in the situations revealed at the  
31 hearing was misleading and constitutes a misrepresentation so as  
32 to probe Complainant's charge of an unfair labor practice. If

1 Complainant's charge is upheld, the Hearing Examiner must also  
2 determine the appropriate recommended remedy.

3 The charge is against Dr. Noyes "and his agents," those  
4 who comprise the petitioners seeking decertification in case DC #8.  
5 Dr. Noyes contended in his reply brief and at the hearing that he  
6 should not be considered a labor organization and accordingly can-  
7 not be guilty of an unfair labor practice. Counsel for Complainant  
8 referred to the definition of "labor organization" in Section 59-  
9 1602(5), R.C.M. 1947:

10 any organization or association of any kind in which  
11 employees participate and which exists for the primary  
12 purpose of dealing with employers concerning grievances,  
13 labor disputes, wages, rates of pay, hours of employ-  
14 ment, fringe benefits, or other conditions of employment.

15 It appears that Dr. Noyes and those seeking decertification  
16 of the Coalition would fall into this definition, in view of their  
17 combined activities to determine the sentiment among the faculty  
18 members for decertification of the existing bargaining repre-  
19 sentative. Counsel further pointed out that Section 59-1607(1),  
20 R.C.M. 1947, in setting up the procedure for hearing an unfair  
21 labor practice complaint, says, "Whenever a complaint is filed  
22 alleging that any person has engaged in or is engaging in any  
23 such unfair labor practice . . ., (emphasis added) and "person",  
24 according to Section 59-1602(8), "includes one or more individuals."  
25 Respondents therefore seem to clearly be subject to the rights and  
26 responsibilities of the Montana statutory provisions for collective  
27 bargaining as a labor organization.

28 Counsel for Complainant alleges in his brief that the rep-  
29 resentations of Respondents in circulating both the November  
30 petition and the April authorization cards should be considered  
31 by the Hearing Examiner, even though the November petition lacked  
32 formality necessary to call for a representation election. The  
33 total of all testimony and evidence will be considered by the  
34 Hearing Examiner as requested by Counsel, but the representations

1 concerning the earlier petition. That is because the issue here  
2 is what the signers of the cards could reasonably have been led  
3 to believe, not what may have been the belief of the signers of  
4 the petition, a document expressing mere intention and having no  
5 power to initiate proceedings with this Board that would give the  
6 parties the rights and responsibilities under Montana's collective  
7 bargaining laws.

8 Dr. Madden testified at the hearing and Counsel for Comp-  
9 lainant emphasized in his brief that although the signers of the  
10 cards were college professors with advanced academic degrees, it  
11 should not be assumed that they had any expertise to interpret  
12 the language on the cards or that they had even a working know-  
13 ledge of thier rights under the collective bargaining laws. The  
14 hearing Examiner will consider these remarks in making his  
15 recommended order and will consider all other factors necessary  
16 to ensure the protection of the rights of all parties involved  
17 conferred by the collective bargaining laws.

18 Counsel for Complainant cites in his brief several cases  
19 decided by the National Labor Relations Board (NLRB) and United  
20 States circuit courts of appeals that considered the effect of  
21 inaccurate and misleading representations to would-be signers of  
22 authorization cards. Made by labor organizations the leading case  
23 has been NLRB v. Cumberland Shoe Corp., 351 F.2d 917, 60 LRM 2305  
24 (6th Cir. 1965, enforcing Cumberland Shoe Corp., 54 LRM 1233 (1963))  
25 which turned on the ruling that if authorization cards are  
26 solicited with the representation that they will be used for an  
27 election and they are later used to prove majority status, there  
28 is no misrepresentation. Misrepresentation occurs under the  
29 Cumberland rule only when the signers are told the cards will be  
30 used only for an election.

31 The rule has been subject to much discussion in the courts.  
32 In NLRB v. Koehler, 55 LRM 2570 (7th Cir. 1964), the court would



1 enforce the NLRB's order to the employer to bargain with the  
2 union. The order, made on the basis of a majority of the employees  
3 signing authorization cards, was held invalid because all the  
4 employees had been told the cards were, in the words of one  
5 witness, "not to get a Union in there, it was just so there would  
6 be a vote to see if a Union would get in there".

7 The court said in NLRB v Winn-Dixie Stores, Inc., 58 LRRM  
8 2475, 2478 (6th Cir. 1963):

9 The decisions of the Board as well as the opinions of  
10 the courts place more emphasis upon the representations  
11 made to the employees at the time the cards were signed  
12 than upon the language set forth in the cards. If in  
13 fact misrepresentations are made by the union to employees  
to the effect that the only purpose of the card is to  
authorize the union to petition the Board for an election,  
the card will not be construed to authorize representation,  
even though it contains language to that effect.

14 The court found that the NLRB's decision that there were no mis-  
15 representations of sufficient weight to invalidate the authorization  
16 cards' selection of the union as the employees' proper bargaining  
17 agent was based on substantial evidence.

18 A misrepresentation may not be as serious when there is no  
19 ambiguity in the language in the card, as indicated in NLRB v.  
20 Peterson Bros., Inc., 58 LRRM 2570 (5th Cir. 1965). The wife of  
21 one employee who could not read signed and sent in an authorization  
22 card for her husband. The card read:

23 I, the undersigned employee, . . . hereby selected  
24 the above named union as my collective bargaining agent.  
25 This is not an application for membership. This card  
26 is for use in support of a demand of this union for  
recognition from the company in your behalf, or for  
an N.L.R.B. election. (Emphasis added.)

27 Upon finding that his wife had sent in the card, he had her read  
28 him the letter that accompanied it. He became angry because he  
29 did not favor the union, but was only neutral toward it. He  
30 testified that he did not try to get the card back because the  
31 company president told him the cards did not make any difference  
32 since there would be an election anyway. The court said at 58

1 LRRM 2572, "This reliance upon the president's statement might  
2 not have any substantial effect were it not for the ambiguous  
3 language on the face of the card." It was accordingly held his  
4 card could not count toward the selection of the union as bar-  
5 gaining representative.

6 9. Crawford Mfg. Co. v. NLRB, 66 LRRM 2529 (4th Cir. 1967),  
7 concerned misrepresentations about cards that clearly designated  
8 the union as the desired collective bargaining representative for  
9 the signers and that said nothing about an election. The court  
10 said the trial examiner found with "ample justification" that  
11 some employees were led to believe that signing the cards would  
12 only call for an election and that others were confused by the  
13 union's representations as to the cards' significance. The  
14 examiner also found that some employees were led to believe that by  
15 signing the cards they would not be joining the union until the  
16 union had won the election and had succeeded in negotiating a  
17 contract satisfactory to the employees. The court said at 66  
18 LRRM 2532:

19 Proof of such a prevalent and pervading misconception  
20 when generated by the union organizer's representations  
21 cannot be ignored. It is not decisive that the cards  
22 in their terms contained no suggestion that they sig-  
23 nified anything less than a direct grant of authority  
24 for the union to act as collective agent for the employees.  
25 Despite the regard we hold for the contrary opinion,  
26 e.g., NLRB v. Cumberland Shoe Corp., 351 F.2d 917, 920,  
27 60 LRRM 2305 (6 Cir. 1969) and cases there cited, we  
28 will not stick mechanically to the literal phrasing of  
29 the cards. A ghost of the parol evidence rule, such  
30 literalism subordinates what really counts: the actual  
31 understanding of the signers.

32 It was held in Engineers & Fabricators, Inc. v. NLRB, 64  
33 LRRM 2049 (5th Cir. 1967), that when cards are challenged because  
34 of alleged misrepresentations by the union in their solicitation,  
35 the NLRB cross-petitioning for enforcement of its order has the  
36 burden of proving the subjective intent to authorize representation  
37 by the union was not vitiated by the misrepresentations. This  
38 would be so even though the employees had not been told that the

1 only purpose of the cards was to institute an election.

2 The United States Supreme Court, as Counsel mentions in his  
3 brief, was faced with a question of the validity of the Cumberland  
4 rule in NLRB v. Gissell Packing Co., \_\_\_ U.S. \_\_\_, 71 LRM 2481  
5 (1963). The court said at 71 LRM 2493:

6 In resolving the conflict among the circuits in favor  
7 of approving the Board's Cumberland rule, we think it  
8 sufficient to point out that employees should be bound  
9 by the clear language of what they sign unless that  
10 language is deliberately and clearly canceled by a union  
11 adherent with words calculated to direct the signer to  
12 disregard and forget the language above his signature.

13 It appears then that the trend of the cases cited above  
14 culminated in the Supreme Court's statement that card signers will  
15 be bound by the clear language of the card unless they have been  
16 given misrepresentations that clearly preclude their signatures.  
17 Applying this rule to the case at hand makes it incumbent upon  
18 the Hearing Examiner to recommend dismissal of the complaint.

19 The cards for decertification of the Coalition say:

20 I, the undersigned, a member of the Eastern Montana  
21 College Faculty Bargaining Coalition (AFT-AAMF) no  
22 longer believe this Coalition represents the interests  
23 of the majority of the employees in the unit.

24 Name

25 Date

26 It was not established by the evidence that any signers of the  
27 cards signed believing they were casting a vote of confidence in  
28 the coalition. Dr. Noyes probably did mention "vote of confidence"  
29 to Dr. Madden in his conversation with him concerning the November  
30 petition, but it was not established that he said signing it would  
31 constitute a vote of confidence. (See Finding of Fact No. 4)  
32 Dr. Madden, furthermore, did not sign the petition. The term  
"vote of confidence" was also used in conversations with Dr.  
Mausman (Finding of Fact No. 8), Dr. Ziegler (Finding of Fact No.  
9), Dr. Plank (finding of Fact No. 10), and Ms. Meide (Finding of  
Fact No. 18, 11, and 12). The conversation Dr. Plank and Ms.  
Meide had with a card signer is the only evidence that someone signed

1 the card believing it to be a vote of confidence. (See Finding  
2 of Fact No. 11.) But that person did not say he was told that  
3 signing it would be such a vote, and the Hearing Examiner is  
4 unable to draw the inference that any other members of the faculty  
5 were expressly told that signing the card would be such a vote  
6 after considering the hearsay evidence of Dr. Madden (Finding of  
7 Fact No. 7) and the testimony of Ms. Meide that some signed the  
8 November petition believing it to be a vote of confidence (Finding  
9 of Fact No. 12).

10 The Hearing Examiner sees nothing prejudicial to the rights  
11 of those signing the cards by the mere use of the term "vote of  
12 confidence," as it appears quite fair to use that term in the  
13 context of looking ahead to a representation election where all  
14 those supporting the Coalition would have the opportunity to so  
15 express themselves. (See Findings of Fact No. 3, 4, 7, 8, and  
16 10.) This is analogous to the situation described by the U.S.  
17 Supreme Court in *Gissel*, *supra*:

18 There is nothing inconsistent in handing an employee a  
19 card that says the signer authorizes the union to rep-  
20 resent him and then telling him that the card will  
21 probably be used first to get an election. Elections  
have been, after all, and will continue to be, held in  
the vast majority of cases. (71 LRRM at 2493)

22 The cases cited by counsel also show that before the courts  
23 will overturn the results of a showing of interest by authorization  
24 cards, there must be evidence of a sufficient number of signers  
25 having been given misrepresentations so as to find that a majority  
26 (or other applicable percentage) of the signers did not support  
27 the petitioned-for issue. (See *Trend Mills, Inc.* 154 NLRB No.  
28 7, 59 LRRM 1714, *Peterson*, *supra*, and *Kochler*, *supra*.) Only one  
29 of the 68 cards supporting decertification was shown to be  
30 questionable. (See Finding of Fact No. 11.) The Hearing Examiner  
31 made it clear to counsel that he would allow any card signer to  
32 testify if Counsel could show the relevance of such testimony.

1 Since there is insufficient evidence to support the unfair  
2 labor practice charge, it is unnecessary to determine the appro-  
3 priate remedy.

4 CONCLUSIONS OF LAW

5 1. Robert N. Noyes and others who circulated decertification  
6 cards fall under the definition of "labor organization" of the  
7 Montana collective bargaining statutes and are accordingly con-  
8 ferred the legal rights and responsibilities conferred on labor  
9 organizations under those statutes.

10 2. Robert N. Noyes and his agents did not commit an unfair  
11 labor practice in their conduct attending the circulation of the  
12 decertification cards.

13 RECOMMENDED ORDER

14 The unfair labor practice complaint brought against Robert  
15 N. Noyes and his agents is hereby dismissed.

16 DATED this 29th day of July, 1977.

17  
18 BOARD OF PERSONNEL APPEALS

19  
20 BY Jerry L. Painter  
21 Jerry L. Painter  
22 Hearing Examiner  
23  
24  
25  
26  
27  
28  
29  
30  
31  
32